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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KATHERINE A.
and KENNETH J. WEBER.

KATHERINE A. WEBER,

Appellant,

v.

KENNETH J. WEBER,

Appellant.

D068204

(Super. Ct. No. D529525)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Patrick J. McCrary, for Appellant Kenneth J. Weber.

Stephen Temko and Dennis Temko; Katherine A. Weber, in pro. per., for Appellant Katherine A. Weber.

INTRODUCTION

Kenneth J. Weber (father) appeals a judgment of dissolution on reserved issues. He contends there was insufficient evidence to support the court's finding he was a heavy marijuana user and the court erred in not ordering an accounting regarding the use by Katherine A. Weber (mother) of a home equity line of credit (HELOC) taken on the marital home. We conclude there was substantial evidence to support the court's finding regarding father's marijuana use and the court did not abuse its discretion in denying father's request for an accounting of the HELOC. We affirm the judgment.¹

BACKGROUND

A

Mother and father were married in 1995. They separated in May 2011 and mother filed for dissolution of the marriage. The court terminated their marital status in March 2012. It entered judgment on reserved issues in April 2015. They have four children. When the judgment was entered the oldest son was 18 years old, the daughter was 16 years old, the middle son was 14 years old, and the youngest son was 10 years old.

The couple enjoyed a lavish lifestyle during their marriage. They had joint passive income of more than \$1 million per year and they spent all of that income each year.

¹ Mother filed a cross-appeal and submitted a stipulated briefing schedule. However, she did not file a combined respondent's brief and cross-appellant's opening brief. She filed a respondent's brief without raising any issues related to a cross-appeal. She did not file a cross-appellant's reply brief. Therefore, we treat mother's cross-appeal as having been abandoned. (*County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 27, fn. 4; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451-452.)

They lived near Chicago, Illinois in a historic mansion overlooking Lake Michigan, which they renovated over a 10-year period.² When the couple separated in 2011, mother and the three younger children moved to California. Father and the oldest child remained in the Chicago area for a period of time, but later also moved to California.

The court issued a statement of decision on reserved issues in which it concluded both parents lied about important facts, both parents subordinated the children's needs to their own, neither parent seemed inclined to alter his or her behavior, and neither accepted responsibility for their part in the chaos surrounding their children's lives.

Among the court's general findings regarding custody, the court stated, father "is a heavy marijuana user, which he did not deny." The court found father "is well past the point he can be a casual user, and he must stop altogether." The court noted when the youngest son "texted his father [to say] he had told the custody evaluator more good things about him than mom, [f]ather responded with a text about having some weed. ... Father did not explain this text during his examination, and the [c]ourt assumes he would have rebutted the evidence if he could. ... The court therefore concludes he has been sharing marijuana with the children."³

² During the proceedings, the court ordered joint property located in Illinois to be sold for \$4,585,000 with \$125,000 each to be distributed to mother and father at the close of escrow as predistribution of community property.

³ A text message exchange between the father and the youngest son was admitted into evidence. The son said he told the evaluator "good stuff" about the father, to which the father responded, "Thank you." The exchange continued, "Come to [oldest son's] room weed ziggurats now. Come please. ... Come inside I found a lot of good ones." The father apparently responded saying, "I'm here." The source of the marijuana is not

Although the court indicated father was more involved with the children than mother, they were not his first priority. "He set[] no boundaries, fill[ed] the house with his buddies when the kids should [have been] doing homework, got so drunk at [the daughter]'s bat mitzvah he was removed, and forgot to enroll [the oldest son] in school." The court found father involved the children in "a destructive loyalty contest" by constantly bad-mouthing mother and referring to her by derogatory terms. He assaulted mother in front of the youngest son, who was then eight years old, and the oldest son intervened in the fight. The court also found father was not an appropriate disciplinarian and allowed the children to do whatever they wanted. His lack of planning resulted in the oldest son missing school and not being registered for the 2014 fall semester.

The court found mother "abandoned her role as a parent and turned the child-rearing over to her employees" and was "not able to put [the] children's needs ahead of her personal and social life." Mother moved out of state even though she recognized her daughter would suffer if the daughter left her private school and the daughter would rebel against living with father. The court noted mother terminated her deposition saying she was ill, "but really had plans to go to the track with her friends, and she did, all of which was posted on [social media]. It demonstrates how cavalierly she can cast aside her responsibilities to her family, and lie about it." The court found mother had not considered how her move out of state would affect the children, but concluded if she could "truly get her feet under her ... it will benefit the children in the long run."

clear from this exchange, but it was reasonable for the court to infer some sharing of marijuana between the father and the children occurred.

The court awarded a 50/50 time share for the oldest son to set support, noting this son was in boarding school in Florida paid for by his maternal grandfather making the financial commitment of the parents approximately equal. Since the middle son was in another boarding school in California, also paid for by his maternal grandfather, the court used a 50/50 time share for support purposes, but gave the father primary physical custody, deleting the days and weekends the middle son would spend at school.

The court noted it was left with competing interests for the daughter since she needed the stability of remaining at her private school, but the court's custody evaluator testified "[she] should not be forced to spend more than one evening a week (not an overnight) with her father." The court initially ordered primary custody to father once mother moved because the importance of the daughter remaining in her school outweighed the detriment of living with father.

The court noted the youngest son was more closely bonded with his nanny and his siblings than with either of his parents and was particularly vulnerable. Nevertheless, the court determined the mother had been his primary caretaker and she should nurture her relationship with him before he suffers serious emotional problems. The court found it would be in the youngest son's best interest to move with his mother out of state.

Among other orders, the court ordered that "[f]ather's continued denigration of [m]other in front of the children and his marijuana use will justify a change of custody and/or limiting [f]ather 's parenting time. Put another way, if [f]ather does not change his behavior, it will be the legal equivalent of a material change of circumstances."

As part of the orders for division of property, the court noted the marital home in Illinois was community property, the sale price of the home was reasonable, and the parties had already split the proceeds from the sale. The court determined the HELOC on the home was community debt and declined to order reimbursement for personal use of the money from the HELOC noting it was paid off through the sale of the home. The court denied "[f]ather's request for an accounting on the alleged misuse of those funds by [m]other."

B

The daughter petitioned the court for emancipation stating her mother was moving out of state without her and she refused to live with her father. In support of emancipation, the daughter submitted a declaration stating she remembered seeing her father smoke marijuana when she was seven or eight years old. If she told her mother about her father's marijuana use, father would lock her and her oldest brother in their rooms. She stated father received multiple driving under the influence charges. She found marijuana and cocaine in father's closet before her parents divorced.

The daughter testified she and her middle brother used marijuana provided by their father more than once. Her middle brother got into trouble for having a bong he picked up from father's house. The daughter stated she and her brother found marijuana in their father's jacket. She knows her father smokes and said he has been smoking as long as she remembers.

The court issued an addendum to the statement of decision in which it denied emancipation because father objected. However, the daughter refused to move in with

her father. Instead, the daughter stayed in a home owned by her grandmother, which she previously had shared with her mother and siblings. She lived there with her nanny and her nanny's husband. She testified she was uncomfortable at her father's house because he hangs out with older men and "trashy women."

The court found the daughter was embarrassed by her father's postings on social media, which included drunken parties and other inappropriate things. The court noted its prior finding that father was "a heavy, chronic user of marijuana," stating the daughter reiterated this fact and said he also drank too much around her. The court found by clear and convincing evidence the daughter's nanny provided a stable environment and assumed the role of her parent by providing both for her "physical and psychological needs for care, affection, structure and boundaries." Therefore, the court concluded placement with the nanny in a home provided by the daughter's family was in the daughter's best interest pursuant to Family Code section 3041, subdivision (c).

C

Thereafter, both parties sought modification of the custody order based upon the middle son leaving his boarding school, the mother's remarriage, and mother's termination of employment for the youngest son's nanny. The court entered additional findings and orders regarding support and visitation.

The court found the middle son's best interest to remain with father in San Diego where he was enrolled in a new private school. The court established the child-sharing percentage for this child to be 80 percent with father and 20 percent with mother.

The court found it was in the youngest son's best interest to remain with mother where he was stable and happy. The court also found his "best interests were served by severing the unhealthy bond" with his former nanny. The court established the child-sharing percentage for this child as 80 percent with mother and 20 percent with father.

DISCUSSION

I

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." [Citation.] Under this test, we must uphold the trial court ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) "[T]he ... court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.'" [Citation.] This requires the court to consider all the circumstances." (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1091.) The deference called for under the abuse of discretion standard "varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.) The testimony of a single witness may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

In this case, father does not challenge the terms of the court's custody or visitation order, but challenges the court's factual finding he was a "daily and heavy" marijuana user to which we apply the substantial evidence test. The findings in the statement of

decision only refer to "heavy" marijuana use. Later, however, at the emancipation hearing, the court commented it had found father smokes marijuana "every day" and questioned the court's own thinking in placing the daughter with "somebody that's smoking marijuana every day." We conclude there is substantial evidence to support the court's finding.

Mother testified father used marijuana daily and medicinally. She stated he used it every day for as long as she had known him. She stated she was always worried about father's use of marijuana and it was a deal breaker in their marriage. This testimony was consistent with her statement early in the case to a family services evaluator in which she stated father used marijuana twice a day and a child found marijuana paraphernalia in the father's coat pocket.

Father raised a foundation objection to mother's testimony stating she was not with him every day. The court overruled the objection noting she had been with him for a substantial period of time. Mother's counsel clarified she had observed father for over 18 years and marijuana use was always an issue in their marriage. As a reviewing court, we will not " 'reweigh evidence or reassess the credibility of witnesses.' " (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.)

Father admitted he used marijuana and has a prescription card for marijuana. He testified he avoided using marijuana in the presence of the children since the court ordered him to do so and gave up marijuana use for periods of time during the litigation. He also admitted he had fallen back and used marijuana during this period.

The court-appointed custody evaluator was aware of father's marijuana use. His notes of an interview with mother indicate she believed father smoked marijuana daily. Father admitted to marijuana use in a life history form completed for the evaluator. He also admitted in response to test questions that he enjoyed using marijuana and had a drug or alcohol problem. Testing identified father had drug dependency issues. It also indicated he underreported his personal shortcomings.

The court and the custody evaluator discussed whether or not an order requiring the parents to abstain from alcohol or drugs in the presence of the children would be appropriate. The evaluator stated mother thought father drank too much and smoked marijuana, which father denied, and father expressed concern about mother's use of prescription drugs. The evaluator thought the court should consider continuing the abstinence order. When mother's attorney asked the evaluator about the text message exchange between father and the youngest son regarding weed, the evaluator said "I'm not sure exactly what it means, but I think it raises some antennae." This evidence does not suggest the evaluator was unconcerned about father's marijuana use, as father contends.

We conclude there was substantial evidence to support the court's factual findings regarding father's heavy marijuana use. This finding was bolstered by further evidence at the daughter's emancipation hearing wherein the daughter testified her father had used marijuana since she was a child, she had found drugs in his clothing, and her father had supplied marijuana and paraphernalia to the children.

Father's reliance on *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 is misplaced. That case involved a juvenile dependency case in which the court was faced with deciding whether return of the child to her mother would create a substantial risk of detriment to her safety, protection, or physical or emotional well-being such that parental rights should be terminated under Welfare and Institutions Code section 366.22. The court concluded there was no evidence the mother "could not provide a home 'free from the negative effects of substance abuse' " because there was no evidence of clinical substance abuse or evidence that one positive drug test out of many impacted the mother's parenting or judgment skills. (*Jennifer A., supra*, at p. 1346.)

In contrast, a case involving custody and visitation determinations, rather than termination of parental rights, "the overarching concern is the best interest of the child" and the court has " 'the widest discretion to choose a parenting plan that is in the best interest of the child.' " (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Here, the court's finding regarding marijuana use was only one of the court's concerns regarding father's parenting. The court also expressed concern about father's lack of discipline for the children, his bad-mouthing of mother in front of the children, his involvement of the children in loyalty contests, and his insensitivity of how his actions toward mother affected the children, particularly when he engaged with her physically in front of them.

Despite all of these concerns, the court initially ordered the parents to share time equally for two of the children who were attending boarding school and awarded primary custody of the daughter to father due to her need to remain in her school rather than move out of state. It ordered father to have visitation with the youngest son, whose primary

custody the court awarded to mother. Later, the court denied the daughter's emancipation request and encouraged her to have regular visits with her father. At the custody modification hearing, the court noted father produced a urine test the court deemed to be "satisfactory compliance." The court awarded primary physical custody of the middle child to father, but denied father's request to have sole decisionmaking authority regarding the child's education.

The court's parenting plan reasonably shared custody and visitation between the parents, taking into consideration the concerns the court had about both parents. We conclude it is not reasonably probable father would have obtained a result more favorable even if the court had not found father was a "heavy" or "daily" marijuana user. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

II

Father contends mother had a fiduciary duty under Family Code section 721 to provide an accounting of mother's use of the HELOC on the marital property and the court erred in failing to order such an accounting. We disagree.

Family Code section 721, subdivision (a) provides spouses may enter into transactions with one another regarding property and subdivision (b) provides, in such transactions, "spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other." However, this section is not "intended to impose a duty for either spouse to keep detailed books and records of community property transactions." (Fam. Code, § 721, subd. (b)(2).) Family Code section 1101 provides a right of action to enforce these fiduciary

duties in which a court "*may* order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in ... community property." (Fam. Code, § 1101, subd. (b), italics added.) Therefore, we apply the abuse of discretion standard.

Here, the evidence regarding the HELOC was limited. Mother testified the HELOC was the only joint account they shared. They made substantial renovations to the marital home in Illinois. Mother used the HELOC after separation to pay the mortgage on the home and other expenses. Father also wrote checks on the account. The HELOC was repaid following the sale of the home.

Because father did not establish he was a nonmanaging spouse without control or access to information about the HELOC and did not establish a prima facie case of mother's misuse of the HELOC, we cannot conclude the court abused its discretion in denying father's request for an accounting. (See *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1267 ["once a nonmanaging spouse makes a prima facie showing concerning the existence and value of community assets in the control of the other spouse postseparation, the burden of proof shifts to the managing spouse to rebut the showing or prove the proper disposition or lesser value of these assets"].)

DISPOSITION

The judgment is affirmed. Mother is awarded her costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

NARES, J.